MICHIGAN SUPREME COURT

Office of Public Information

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CHILD PORNOGRAPHY DISTRIBUTION CHARGE AT ISSUE IN CASE BEFORE MICHIGAN SUPREME COURT NEXT WEEK

LANSING, MI, December 3, 2004 – A challenge to a child pornography distribution charge will be heard by the Michigan Supreme Court next week.

In *People v. Tombs*, defendant Russell Tombs was convicted by a Macomb County jury of distributing or promoting child pornography. Tombs' former employer discovered the pornography when reformatting a laptop Tombs used while employed by that company. Tombs contends that he did not intend for anyone else to see or receive those images and that he should therefore not have been charged with distributing or promoting.

The Court will also hear *Barnes, et al. v. Vettraino, M.D., et al.,* in which a woman and her husband sued doctors for initially failing to detect a fetal abnormality. The couple argues that the woman, who underwent a late-term abortion after they learned of the misdiagnosis, suffered permanent injuries, and pain and suffering. The defendants argue that Michigan does not recognize a civil cause of action for either a doctor's failure to inform parents of the presence of fetal abnormalities or for a wrongful birth based on a physician's failure to warn of birth defects.

Also before the Court are cases involving medical malpractice, worker's compensation, sexual harassment, governmental immunity, criminal procedure, evidence, and constitutional law issues.

Court will be held on **December 8 and 9.** Court will convene at **9:30 a.m.** each day.

(Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's website at http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. For further details about the cases, please contact the attorneys.)

Wednesday, December 8
Morning Session

PEOPLE v. TOMBS (case no. 125483)
Prosecuting attorney: Beth Naftaly Kirshner/(586) 469-5350
Attorney for defendant Russell Douglas Tombs: Peter Jon Van Hoek/(313) 256-9833
Trial court: Macomb County Circuit Court
At issue: This case concerns the quantity of evidence needed to support a defendant's conviction for distributing or promoting child pornography. The defendant left files depicting children in sexual situations on an employer-owned laptop computer. Must the prosecutor show that the defendant intended for someone to see or receive those files?
Background: Russell Tombs was a field technician for Comcast and received a laptop computer for work-related use. Before Comcast issued the computer to Tombs, Comcast removed all non-work-related content from it. Tombs terminated his employment with Comcast in August of 2000 and returned the computer to the company. A Comcast employee reviewed the computer's contents to determine whether it needed to be reformatted before being issued to another technician, and discovered files that contained pictures of a partially naked young girl. Additional files depicting young children in sexual situations were found on the computer, and a search of Tombs' home disclosed over 6,500 pictures that, in the opinion of the Oakland County Sheriff's Department, constituted child sexually abusive material or child pornography. Tombs told a protective services worker that he expected that his computer would be reformatted by Comcast for distribution to another employee. He said that he did not expect that anyone would go through his personal files and find the images. A jury convicted Tombs of distributing or promoting child sexually abusive materials, possession of child sexually abusive material, and using the Internet or a computer to commit these crimes. Tombs appealed, and the Court of Appeals vacated his conviction for distributing or promoting child sexually abusive materials. It held that the prosecutor failed to present evidence that Tombs intended for anyone to see or receive child sexually abusive material when returning the computer to Comcast. As a result, the court concluded that there was insufficient evidence that Tombs distributed child sexually abusive material. The prosecutor appeals.

PEOPLE v. BELL (case no. 125375)
Prosecuting attorney: Timothy A. Baughman/(313) 224-5792
Attorney for defendant Marlon Bell: Douglas W. Baker/(313) 256-9833
Trial court: Wayne County Circuit Court
At issue: The trial court denied defendant his right to peremptorily remove prospective jurors. Was this a "structural error" that is not subject to the harmless error analysis? Is a new trial required?
Background: Defendant Marlon Bell was convicted by a jury of two counts of first-degree felony murder, two counts of armed robbery, and one count of conspiracy to commit armed robbery. The convictions arose from the July 29, 1999, robbery and shooting deaths of Chanel Roberts and Amanda Hodges. Bell was sentenced to concurrent terms of mandatory life imprisonment without parole for each of the felony-murder convictions and life imprisonment for the armed robbery and conspiracy to commit armed robbery convictions. During the trial, the judge denied Bell's peremptory challenge to remove two prospective jurors from the jury pool. Michigan law provides that a party to a criminal lawsuit may – without giving a reason – ask the court to remove up to three potential jurors; this process is known as making a peremptory challenge, as opposed to making a challenge for cause (which would require the challenger to give a reason for removing a potential juror). The most contested issue presented on appeal was

whether the trial court's erroneous denial of Bell's peremptory challenges was structural error that is not subject to harmless error analysis. Under harmless error analysis, even if the trial court erred in a criminal case, an appellate court will not overturn the result if the error did not affect the outcome and was therefore "harmless." In a published opinion, the Court of Appeals panel concluded that the error was nonconstitutional and thus subject to harmless error analysis. The panel considered the circumstances of the case, and concluded that the error was harmless and that Bell was not entitled to a new trial. Bell then filed a motion for reconsideration, and the panel reversed its prior decision. On reconsideration, the Court of Appeals held that the trial court's denial of Bell's right to challenge two jurors was structural error that is not subject to harmless error review. It reversed Bell's convictions and remanded for a new trial. The prosecutor appeals.

BAILEY v. OAKWOOD HOSPITAL AND MEDICAL CENTER, et al. (case no. 125110)
Attorney for plaintiff Mary Bailey: Daryl Royal/(313) 730-0055
Attorney for defendant Oakwood Hospital and Medical Center: Robert J. Humphrey/(248) 409-9000
Attorney for defendant Second Injury Fund: Morrison R. Zack/(313) 456-0080
Attorney for intervenor Director of the Bureau of Workers' and Unemployment Compensation: Victoria A. Keating/(313) 456-0080
Attorney for amicus curiae Accident Fund Insurance Company of America: Richard R. Weiser/(517) 367-1482
Attorney for amicus curiae Munson Hospital: Martin L. Critchell/(313) 961-8690
Lower tribunal: Worker's Compensation Appellate Commission
At issue: MCL 418.921 limits an employer's liability for a work-related injury suffered by a vocationally disabled employee to 52 weeks; after that, the Second Injury Fund (SIF) is liable. MCL 418.925 requires an employer to notify the SIF within a certain timeframe if it is likely that the employee will be owed compensation after the one-year anniversary of the injury; the statute does not provide a sanction for noncompliance. When the SIF is dismissed because notice was not timely given under §-925, does the employer become responsible for the benefits that would otherwise be SIF's obligation?
Background: Plaintiff Mary Bailey began working for defendant Oakwood Hospital in 1989. When she was hired, she was certified as vocationally disabled because of a prior back injury. Bailey developed bilateral carpal tunnel syndrome in 1993. When surgery failed to provide relief from the pain, she left her employment with the hospital on September 21, 1994. Oakwood paid worker's compensation benefits for more than a year. In 1998, Oakwood found Bailey's vocationally handicapped worker's certificate and filed a claim against the Second Injury Fund, seeking reimbursement for the benefits that it paid Bailey beyond the 52-week period set by §-921. A worker's compensation magistrate concluded that Oakwood's failure to give timely notice to the SIF meant that Oakwood remained liable for those benefits that the SIF would have paid. The Worker's Compensation Appellate Commission (WCAC) reversed. The WCAC concluded that the SIF was not liable because it did not receive timely notice, and that Oakwood was not liable because §-921 limits its liability to 52 weeks. In a published opinion, the Court of Appeals reversed the WCAC. The appellate court agreed with the magistrate that Oakwood's failure to provide the SIF with timely notice meant that Oakwood could not invoke § 921's 52-week limitation. The Court of Appeals held that Oakwood remains liable so long as Bailey has a covered work-related disability. Oakwood appeals.

Afternoon Session

ELEZOVIC v. FORD MOTOR COMPANY, et al. (case no. 125166)
Attorney for plaintiff Lula Elezovic: Mark Granzotto/(248) 546-4649
Attorney for defendants Ford Motor Company and Daniel P. Bennett: Elizabeth Hardy/(248) 645-0000
Attorneys for amicus curiae Michigan Conference of the National Organization for Women (NOW), Justine Maldonado, Milissa McClements, and Pamela Perez: Carol Hogan/(586) 758-5434, George B. Washington, Miranda K. S. Massie/(313) 963-1921
Trial court: Wayne County Circuit Court
At issue: Plaintiff Lula Elezovic sued her employer, Ford Motor Company, and her supervisor, Daniel Bennett, under the Michigan Civil Rights Act. She alleged that Ford and Bennett were liable for sexual harassment, gender discrimination, and retaliation. Does the Civil Rights Act provide for individual liability against supervisors? Did the trial court commit evidentiary errors that warrant a new trial? Did the trial court err when it found that Ford did not have notice of the alleged sexual harassment?
Background: Lula Elezovic worked for Ford Motor Company at its Wixom assembly plant. She sued Ford and her supervisor, Daniel Bennett, under the Michigan Civil Rights Act. Elezovic alleged that Bennett exposed his penis and masturbated when alone with her, made obscene gestures, physically assaulted her on one occasion, and made repeated sexual remarks. She claimed sexual harassment (quid pro quo and hostile environment), gender discrimination, and retaliation. After a three-week trial, the trial court granted the defendants' motion for directed verdict, and dismissed Elezovic's claims against both Ford and Bennett. The Court of Appeals affirmed in an unpublished opinion. Relying on *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464 (2002), the appellate court held that the Civil Rights Act does not permit the imposition of individual liability against a supervisor. The Court of Appeals also affirmed the trial court's ruling that Elezovic could not present evidence of Bennett's indecent exposure conviction, and when it ruled that she could not introduce into evidence a database created by her attorney that documented other charges of harassment that allegedly occurred at the Wixom plant. The Court of Appeals also concluded that Ford did not have notice of the alleged sexual harassment. Elezovic appeals.

BARNES, et al. v. VETTRAINO, M.D., et al. (case no. 123661)
Attorney for plaintiffs Sharon Barnes and Tim Barnes: Scott E. Combs/(248) 380-5050
Attorney for defendants Ivana Vettraino, M.D., William Blessed, M.D., and Providence Hospital: Linda M. Garbarino/(313) 964-6300
Attorney for defendant Michael Roth, M.D.: James G. Gross/(313) 963-8200
Trial court: Oakland County Circuit Court
At issue: The plaintiffs, a married couple, argue that defendants' misdiagnosis of fetal genetic defects, and delay in notifying the plaintiffs of the defects, delayed their ability to obtain an abortion. The plaintiffs sued, alleging that the defendants breached their professional duties and that plaintiff Sharon Barnes suffered permanent physical, emotional, and financial injuries, and pain and suffering as a result. Does Michigan law recognize this type of lawsuit?
Background: Plaintiff Sharon Barnes learned that she was pregnant, and Dr. Michael Roth recommended that she have an amniocentesis because of her age. The plaintiffs opted for the

test, and were initially informed that it did not reveal any significant problems with the pregnancy. Later, they learned that there had been a misdiagnosis, and that a chromosomal anomaly did exist. They decided to terminate the pregnancy, and traveled to Kansas, where a late-term abortion was performed. They then sued, alleging that Dr. Roth and other defendants had been negligent, and that the defendants' actions caused Sharon Barnes to suffer permanent physical, emotional, and financial injuries, and pain and suffering. The defendants asked the trial court to dismiss the plaintiffs' lawsuit. Relying on *Taylor v Kurapati*, 236 Mich App 315 (1999), the defendants argued that Michigan does not recognize a civil cause of action for either a physician's failure to inform parents of the presence of fetal abnormalities or for a wrongful birth based on a physician's failure to warn of birth defects. The trial court denied the defendants' motion. The Court of Appeals majority affirmed the lower court's ruling in an unpublished decision, with one judge dissenting. The defendants appeal.

REGAN/ZELANKO v. WASHTENAW COUNTY BOARD OF COUNTY ROAD COMMISSIONERS (case nos. 124163-4)
Attorney for plaintiffs Dona Regan and Brian Regan: Thomas H. Blaske/(734) 747-7055
Attorney for plaintiff Leonard Zelanko: David F. Greco/(248) 355-0300
Attorney for defendant Washtenaw County Board of County Road Commissioners: Jon D. Vander Ploeg/(616) 774-8000
Trial court: Washtenaw County Circuit Court
At issue: The plaintiffs claim to have been injured as a result of an object or dust thrown up by equipment operated by the road commission tractors as part of highway maintenance operations. Are these tractors "motor vehicles" and did these injuries arise as a result of their "operation" as motor vehicles?
Background: These consolidated cases were brought by plaintiffs who claimed injuries from dust (Regan) or an object (Zelanko) thrown up by equipment attached to tractors being operated by Washtenaw County Road Commission employees. The road commission moved for summary disposition, arguing that it was immune from suit. The plaintiffs sought to avoid the bar of governmental immunity, using the motor vehicle exception in MCL 691.1405, which states that governmental agencies are liable for bodily injury and property damage resulting from an employee's negligent operation of "a motor vehicle. . . ." The trial court denied the road commission's motions for summary disposition, and the Court of Appeals issued a pair of published decisions affirming those rulings. The road commission appeals. It argues that the tractors were not "motor vehicles" and were not being operated as "motor vehicles." They were being used for road maintenance and not for transportation, the road commission contends.

Thursday, December 9
Morning Session Only

ASSOCIATED BUILDERS & CONTRACTORS, SAGINAW VALLEY AREA CHAPTER v. DIRECTOR OF THE MICHIGAN DEPARTMENT OF CONSUMER & INDUSTRY SERVICES, et al. (case no. 124835)
Attorney for plaintiff Associated Builders & Contractors, Saginaw Valley Area Chapter: David John Masud/(989) 792-4499
Attorney for defendant Director of the Michigan Department of Consumer & Industry Services: Richard P. Gartner/(517) 373-2560

Attorney for defendants intervenors Michigan State Building & Construction Trades Council, et al.: John R. Canzano/(248) 354-9650
Attorney for intervenor Saginaw County Prosecuting Attorney: David M. Gilbert/(989) 790-2500
Trial court: Midland County Circuit Court
At issue: The plaintiff, an association of non-union contractors, filed a lawsuit alleging that the Prevailing Wage Act is unconstitutional. The trial court reviewed the merits of the plaintiff's claims. The Court of Appeals briefly discussed the merits, but then ruled that there was no "actual controversy" between the parties. For this reason, the Court of Appeals held, the plaintiff's declaratory judgment action could not be maintained. Is the Court of Appeals correct?
Background: The Prevailing Wage Act, MCL 408.551 *et seq*, requires that certain contracts for state projects include a provision requiring the contractor to pay the "prevailing" wages and fringe benefits for projects of the same character in that locality. Plaintiff Associated Builders and Contractors, Saginaw Valley Area Chapter is an association of non-union contractors. It brought this action for declaratory and injunctive relief against the Director of the Department of Consumer & Industry Services and the Midland County Prosecutor, challenging the statute's constitutionality. The trial court ruled on the merits of the case, agreeing with the defendants that the statute was not unconstitutionally vague. The court did, however, allow Associated Builders to proceed with its claim that the statute amounted to an unconstitutional delegation of legislative authority to unions and union contractors. The Court of Appeals granted leave to appeal. The appellate panel noted Associated Builders' constitutional challenge, but concluded that there was no "actual controversy" because the injuries that Associated Builders seeks to prevent through the lawsuit are merely hypothetical. Accordingly, the Court of Appeals ruled that Associated Builders' entire declaratory judgment action could not proceed. Associated Builders appeals, arguing that there is an actual controversy, and that the Court of Appeals, having ruled that it did not have jurisdiction over the case, should not have addressed the merits of the plaintiffs' claims.

PEOPLE v. TATE (case no. 123641)
Prosecuting attorney: Jeffrey A. Caminsky/(313) 224-5846
Attorney for defendant Deleon D. Tate: Jonathan B.D. Simon/(313) 964-0533
Trial court: Wayne County Circuit Court
At issue: Did the trial court err in refusing to determine whether the defendant's typewritten statement was voluntary, in light of the fact that the defendant denied knowing about the typewritten statement and said that he was coerced into making a different, handwritten statement? What evidence did the defendant present to show that the typewritten statement was coerced?
Background: Defendant Deleon Tate was suspected of being involved in an armed robbery that resulting in a shooting death. At the pretrial hearing, a police officer testified that Tate voluntarily made a statement to the police, that the statement was typed, and that Tate signed it. Tate, on the other hand, claimed that he signed a handwritten statement, because he was coerced into doing so, but he denied ever signing a typewritten statement. At the conclusion of the pretrial hearing, the trial court ruled that the typewritten statement could be used at trial. The trial judge acknowledged that Tate denied making the typewritten statement, but concluded that the jury should decide whether Tate was telling the truth. The trial judge also concluded that Tate did not allege that the *typewritten* statement was the product of coercion, and so the judge

did not rule on whether that statement was involuntary. The typewritten statement was admitted at trial. The jury found Tate guilty of first-degree felony murder; he was sentenced to life in prison. The Court of Appeals agreed with the trial court that Tate was not entitled to a ruling on whether the statement was coerced. The appellate court also rejected Tate's claim that the evidence was insufficient to establish felony murder, and that the prosecutor committed misconduct during closing argument. Tate appeals.

WARD v. CONRAIL (case no. 124533)
Attorney for plaintiff William Frank Ward: Mark R. Bendure/(313) 961-1525
Attorney for defendant Consolidated Rail Corporation d/b/a/ Conrail: Gregory A. Clifton/(313) 963-3033
Trial court: Wayne County Circuit Court
At issue: What is the consequence, if any, of the defendant employer's inability to produce at trial the allegedly defective locomotive handbrake that the plaintiff claims caused his injuries? Did the trial court properly inform the jury that the handbrake was presumed defective? Did the trial court properly instruct the jury that it could draw an adverse inference from the missing evidence?
Background: Plaintiff William Frank Ward, a railroad engineer, claimed that he was injured by a faulty handbrake that he was using to secure one of Conrail's locomotives. In response to Ward's injury report, a Conrail employee inspected the handbrake assembly and found that it was working properly. The locomotive was returned to service and operated without incident for more than two weeks. Nineteen days after Ward's injury, another employee reported a different problem with the handbrake. This time, the locomotive was examined by Conrail's Elkhart, Indiana maintenance supervisor, who removed and discarded the entire handbrake assembly, and installed a new one. Ward filed this lawsuit more than ten months later, seeking damages for his injuries. The trial court was asked to decide what to do about the missing handbrake. The court ruled that Ward was entitled to a presumption that the handbrake was defective, and it instructed the jurors that they could draw an adverse inference from Conrail's inability to produce the handbrake at trial. The trial court did not inform the jurors that no adverse inference should be drawn if they found that Conrail had a reasonable excuse for discarding the handbrake. The jury returned a verdict for Ward and awarded damages. Conrail appealed, and the Court of Appeals affirmed the trial court. Conrail appeals.

WOODARD, et al. v. CUSTER, M.D., et al. (case nos. 124994-5)
Attorney for plaintiffs Johanna Woodward, Individually and as Next Friend of Austin D. Woodard, a Minor, and Steven Woodward: Craig L. Nemier/(248) 476-6900
Attorney for defendant Joseph R. Custer, M.D. and University of Michigan Medical Center: Kevin P. Hanbury/(248) 646-1514
Trial court: Washtenaw County Circuit Court and Court of Claims
At issue: Did the trial court properly rule that the plaintiffs' expert was not qualified to testify against the defendant physician? Do the plaintiffs even need expert support for their medical malpractice claims?
Background: Plaintiffs' son Austin was admitted to the Pediatric Intensive Care Unit ("PICU") at the University of Michigan, where he was treated for a respiratory problem. When he left the PICU, doctors discovered fractures in his femurs. The Woodards sued Dr. Joseph Custer and the hospital, alleging that the fractures were the result of negligent medical procedures (for example,

improper placement of arterial and venous lines). The trial judge held that the Woodards' expert witness was not qualified to testify against Dr. Custer; accordingly, the judge granted the defendants' motion to strike the Woodards' expert witness. The court also rejected the Woodards' argument that negligence could be inferred from the fact that Austin was admitted to the PICU with healthy legs and left with fractured legs. Without expert testimony, the Woodards could not take their case to a jury, the court said in dismissing their lawsuit. The Court of Appeals affirmed the trial court's ruling that the plaintiff's expert was not qualified to testify against Dr. Custer. But the appellate court reversed the trial court's dismissal of the lawsuit, holding that the Woodards did not need expert testimony because the negligence would be apparent to a layperson. The Court of Appeals remanded the case for trial. Both the plaintiffs and the defendants appeal. The defendants ask the Supreme Court to consider whether the plaintiffs need expert support for their claims of medical malpractice. The plaintiffs ask the Supreme Court to consider whether the trial court properly ruled that their expert was not qualified to testify against Dr. Custer.

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